

Charters, Markets, and Universalism

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I. INTRODUCTION

Racial segregation in public schools is intensifying at an alarming rate.¹ Yet, the options for remedying school segregation are limited. Modern Supreme Court school desegregation jurisprudence significantly tightened the legal requirements to both place and keep a public school under a federal court school desegregation order.² Intense residential segregation creates pragmatic obstacles to fashioning

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1. See, e.g., GARY ORFIELD ET AL., C.R. PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE 6–9 (May 15, 2014) (finding that a decrease in the number of white students enrolled in public schools and an increase in the number of students of color has led to an increase in the number of intensely segregated public schools).

2. See Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 203 (2016) (arguing that “the heightened causation standard in school desegregation cases, played a significant role in limiting the effectiveness of the federal judiciary in addressing racial segregation in schools”).

student assignment plans that can effectively integrate schools.³ Further, student assignment plans that require bussing or other forms of involuntarily displacement from neighborhood schools receive fierce resistance from parents and are viewed as politically infeasible.⁴ Consequently, in many ways, school desegregation is no longer prioritized. Instead, many have come to accept school segregation as an inevitable byproduct of residential segregation.⁵ Indeed, few policy incentives exist at the national, state, or local level to address racial segregation in schools.⁶

Yet the harms of racially segregated schools are very real. For students of color, segregated schools correlate with limited educational opportunities, including reduced access to high quality curriculum, fewer highly qualified teachers, and limited exposure to valuable forms of intangible social capital.⁷ For white students, attending racially integrated schools comes with many positive benefits including “more robust classroom discussions, the promotion of critical thinking and problem-solving skills, and higher academic achievement.”⁸

Though the harms of segregated schools and benefits of integrated schools are widely recognized,⁹ rather than addressing school segregation directly, policy-

3. See Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, 45(5) EDUC. & URB. SOC’Y 548, 561–63 (2013) (describing the relationship between housing segregation and school segregation, emphasizing the difficulty in creating integrated schools in the absence of a concerted policy efforts to remedy segregation in housing).

4. See generally, MATTHEW DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND NATIONAL RESISTANCE TO SCHOOL SEGREGATION (2016) (chronicling the challenges and eventual collapse on a national scale of bussing as a remedy to desegregate schools)

5. See, e.g., Rachel Cohen & Will Stancil, *Will America’s School’s Ever Be Desegregated?*, PAC. STANDARD (Dec. 5, 2017), <https://psmag.com/education/will-americas-schools-ever-be-desegregated>, (finding that “[w]here housing segregation was once cited as a legal defense excusing districts from the obligation to integrate, it is now raised as a practical obstacle that makes integration impossible.”); Kate Taylor, *De Blasio Expanding an Education Program, Dismisses Past Approaches*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/nyregion/de-blasio-expanding-community-schools-initiative.html> (noting that “[i]n answer to a question about segregation, the mayor suggested that there was not much he could do. “We cannot change the basic reality of housing in New York City,” he said.”).

6. At the local level, some schools have engaged in voluntary school desegregation programs, but efforts are limited in part because of the Supreme Court’s 2007 decision in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). See e.g., Halley Potter, *A Decade After PICS Setback, Schools Still Find Ways to Integrate*, CENTURY FOUND. (June 28, 2017), <https://tcf.org/content/commentary/decade-pics-setback-schools-still-find-ways-integrate> (describing efforts made by traditional public schools and charter schools to achieve diversity in the aftermath of the PICS decision).

7. Brief for 553 Social Scientists as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927079, at *7 [hereinafter Amici Brief of 553 Social Scientists].

8. See GENEVIEVE SIEGEL-HAWLEY, NAT’L COAL. ON SCH. DIVERSITY, HOW NON-MINORITY STUDENTS ALSO BENEFIT FROM RACIALLY DIVERSE SCHOOLS 1–2 (October 2012).

9. See, e.g., Gary Orfield et al., *Statement of American Social Scientists of Research on School Desegregation to the U.S. Supreme Court in Parents Involved v. Seattle School District and Meredith v. Jefferson County*, 40 URB. REV. 96, 100–01 (2008) (noting that “[r]acially isolated minority schools, research shows, tend to have fewer resources that are critical for the education of students. Importantly, white students—who remained the most isolated group of students—also lose critical opportunities to learn in racially diverse schools because of endwing segregation. Integrated learning experiences challenge racial prejudice and stereotype formation, allow for the formation of cross-racial friendships, and enable students to gain comfort living and working across racial/ethnic lines.”).

makers are turning to free-market-based reforms (“market-based reforms”) as one potential way to ameliorate the harms of segregated schools. Free-markets are theorized as effectively allocating resources, particularly scarce resources.¹⁰ Central to the push for market-based reforms is the notion that extrapolating the strictures of the free-market to public education will result in an efficient allocation of public schools. To that end, market-based reforms seek to improve public education for all students by changing the delivery and governance structure of public education in ways that emphasize deregulation, autonomy, and most importantly choice.¹¹ A key normative underpinning of market-based reforms is that students have racially unequal access to quality schools.¹² The reasons that students have racially unequal access to quality schools are undoubtedly complex, intertwined with race, power, politics, and economics.¹³ Yet an important pragmatic reason students have racially unequal access to quality schools is because student assignment plans are often tethered to residence such that patterns of racial segregation and inequality are replicated in public schools.¹⁴

By disentangling school assignment from residence, and instead allowing students to choose where they want to go to school, proponents of market-based reforms posit that it will result in a more efficient allocation of high-quality schools for all students.¹⁵ They reason that the infusion of parental choice into the market for public schools will create competition amongst public schools.¹⁶ Competition will in turn result in all schools improving the quality of education they offer, or risk losing students.¹⁷

The most widespread and embraced form of market-based reforms are charter schools. Charter schools are publicly funded, privately run, and subject to fewer

10. See, e.g., JULIAN LE GRAND, CAROL PROPER, & RAY ROBINSON, THE ECONOMICS OF SOCIAL PROBLEMS 31 (2008) (“[I]t is the claim that a market system will produce an efficient allocation of resources which provides the major theoretical basis for preferring it to other modes of economic organization.”).

11. See generally JOHN E. CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA’S SCHOOLS (1990).

12. See, e.g., Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, THE BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education> (describing differences in access to quality teachers, curriculum, and other educational inputs for black and white students); Pedro A. Noguera, *Introduction to “Racial Inequality and Education: Patterns and Prospects for the Future”*, 81 THE EDUC. F. 129, 135 (2017) (describing the ways in which race correlates with education opportunity gaps).

13. See generally Jennifer Jellison Holme and Janell Scott, *The Political Economy of Market-Based Educational Policies: Race and Reform in Urban School Districts, 1915 to 2016*, 40 REV. OF RES. IN EDUC. 250, 297 (Mar. 2016) (describing the ways in which race, class, politics, and power coalesced to create current race-based inequalities in urban public schools).

14. See generally Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1436–38 (2014) (describing the ways in which residence-based school assignment plans create disparities between schools and school districts).

15. CHUBB & MOE, *supra* note 11.

16. LE GRAND ET AL., *supra* note 10, at 65 (describing the benefits of applying market systems to public education and noting that “education institutions will be in competition for students . . . and will need to respond by offering those types of education that are in demand”).

17. *Id.*

state regulations.¹⁸ Admission to charter schools in instances where there are more students that want to enroll than seats is typically done by a lottery.¹⁹ Charter schools operationalize the normative underpinnings of market-based reform principles insofar as they operate under a relaxed regulatory structure and ostensibly infuse competition into the public-school assignment process by allowing students to choose a school in lieu of being assigned to attend a school. Policy incentives at both the state and federal level encourage the growth of charter schools.²⁰

Importantly, market-based reforms generally and charter schools specifically, operate against the backdrop of the limitations of federal judicial school desegregation efforts. While federal judicially based school desegregation efforts achieved great success initially, federal judicial retrenchment in its school desegregation jurisprudence,²¹ along with white flight, creates significant obstacles to desegregating schools.²² Given the difficulty in preventing white flight and sustaining federal court school desegregation orders, some parents of color no longer see school desegregation as the most effective means to improve the quality of schools available to their children.²³ Instead, market-based reforms like charter schools are seen as a more viable alternative.²⁴ Consequently, charter schools are positioned as a race-neutral alternative for advancing a quality education for all students, particularly low-income students of color.²⁵ The growth of the charter school movement is particularly prevalent in predominately poor and minority neighborhoods.²⁶

18. For a more in-depth discussion of how charter schools are structured, see Preston C. Green III et al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013).

19. See, e.g., Conor Williams, *What Applying to Charter Schools Showed Me About Inequality*, THE ATLANTIC (Mar. 20, 2014), <https://www.theatlantic.com/education/archive/2014/03/what-applying-to-charter-schools-showed-me-about-inequality/284530> (describing the lottery process for an oversubscribed charter school).

20. See, e.g., Tawnell D. Hobbs, *U.S. Putting \$253 Million Into Charter School Expansion*, WALL ST. J. (Sep. 28, 2017), <https://www.wsj.com/articles/u-s-putting-253-million-into-charter-school-expansion-1506640733> (chronicling the federal financial investment and incentives given to states to fund charter schools.).

21. See generally Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157 (2000).

22. See GARY ORFIELD & CHUNGMEI LEE, C.R. PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 314–15 (2007) (describing the role of judicial retrenchment and white flight in causing modern patterns of segregation in schools); Kimberly J. Robinson, *Resurrecting the Promise of Brown: Understanding and Remedy How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 811–37 (2010) (arguing that modern day Supreme Court jurisprudence reconstitutionalized segregated schools).

23. See, e.g., Karla Scoon Reid, *Minority Parents Quietly Embrace School Choice*, EDUC. WEEK (Dec. 5, 2001), <http://www.edweek.org/ew/articles/2001/12/05/introminority.h21.html> (noting that “[m]any minority parents are impatient at what they see as the plodding pace of school reform; they’re concerned that their own children won’t benefit from long-term improvements to the current public-school system”).

24. *Id.*

25. *Id.*

26. See ERICA FRANKENBERG ET AL., C. R. PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 8 (2010) (“Charter schools attract a higher percentage of black students than traditional public schools, in part because they tend to be located in urban

While much attention is paid in the scholarly literature to the connection between charter schools and race,²⁷ few scholars have situated the proliferation of charter schools within the broader scholarly literature on universalism. Universalism describes the ideological belief that racial inequalities or disparities are best ameliorated through the application of race-neutral laws and policies that are universally applied.²⁸ It suggests that race-neutral programs that are applied universally can do race-sensitive work in ameliorating racial discrimination or inequality. Stated differently, universalism targets structures that lead to inequality broadly defined rather than focusing specifically on discrimination and inequality that occurs along identity axes.²⁹

This Article takes up the task of situating the growth of market-based reforms as advanced by charter schools through the lens of universalism. It argues that market-based means of public-school reform are being utilized, at least in part, to achieve the universalist goal of providing *racially equal access* to public schools for all students. I use the term *racially equal access* to mean that a student's ability to attend a school that has high quality educational inputs does not depend upon or correlate with one's race. I further suggest that the term *high quality inputs* includes, but is not limited to, schools that have highly qualified teachers, rigorous curricular offerings, high levels of student achievement, and well-maintained physical facilities.³⁰

Yet situating market-based reforms as a potentially effective universalist policy response to the problem of racially unequal access to public schools suffers from a fatal flaw. The fatal flaw is that race warps markets.³¹ As a result, this Article argues that rather than providing racially equal access to public schools, the proliferation of market-based reforms as advanced through charter schools in some ways reifies racially unequal access to public schools. The Article proceeds as follows:

Part II provides a working definition of universalism. It chronicles the rise of universalism as a means for vindicating civil rights. It also examines the tactical, substantive, and expressive rationales for universalism. Part III traces the rise of

areas."); SARA MEAD, ASHLEY LIBETTI MITCHEL & ANDREW J. ROTHERHAM, THE STATE OF THE CHARTER MOVEMENT 19 (Sept. 10, 2015) (noting that charter schools are concentrated in urban less affluent areas and that close to two-thirds of the charter-school population is nonwhite).

27. See, e.g., Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 219, 220 (2010); Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 568 (2001).

28. See, e.g., Jessica A. Clark, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1240 (2011); Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. OF L. & FEMINISM 1, 21–23 (2008); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 187–89 (2006).

29. Samuel R. Bagensos, *Universalism and Civil Rights*, 123 YALE L.J. 2838, 2841 (2014).

30. While the term "high quality school" is subject to various interpretation, these characteristics are most widely recognized as being critical. See, e.g., Jack Schneider, *What Makes a Great School?*, HARV. GRADUATE SCH. OF EDUC. (Oct. 23, 2017), <https://www.gse.harvard.edu/news/uk/17/10/what-makes-great-school>.

31. See, e.g., Osamudia R. James, *Opt-Out Education: School Choice As Racial Subordination*, 99 IOWA L. REV. 1083, 1102 (2014) ("[R]ace and identity will warp and ultimately impede a properly functioning education market where choices are presumably exercised."); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 735 (2000) (analyzing the salience of race to free-market principles and suggesting competition is not unfettered because it "takes place in markets where white monopoly power may have become self-reinforcing").

market-based reforms in public education. It argues that market-based reforms as advanced through charter schools is in part a universalist response to the limitations of federal judicially based school desegregation efforts in providing racially equal access to public schools.

Part IV sets forth the critique of charters as a universalist approach to providing racially equal access to public schools. It argues that market-based reforms as advanced by charter schools fall short of being an effective universalist solution because race creates both sub-optimal market conditions and a collective action problem that is rooted in the historical realities of race, racial hierarchy, and racial subordination. Part V concludes by offering some suggestions on the ways in which market-based reforms as advanced by charters might be used to supplement, but not supplant, particularistic approaches to ensuring racially equal access to public schools.

II. UNIVERSALISM AS A SOLUTION TO CIVIL RIGHTS PROBLEMS

A. Defining Universalism

Legal scholars across many substantive areas tout universalism as an appropriate solution to addressing inequality and discrimination typically seen as civil rights issues.³² Scholars apply various definitions to the term universalism. Professor Samuel Bagenstos, for example, defines universalism as an approach that “guarantees a uniform floor of rights or benefits for all persons . . . not defined according to their identity axes (e.g., race, sex).”³³ Professor Jessica Clarke posits that the trend towards universalism consists of “(1) changing the axis of protection from identity traits to universal conditions like vulnerability, (2) shifting focus from equal rights to universal rights like liberty or dignity, or (3) moving away from condemnation of prejudice toward banning disrespect or irrational decision making.”³⁴ Finally, Professor Kenji Yoshino suggests that universalism entails expanding the way in which civil rights issues are framed, moving from a focus on prohibiting discrimination based on membership in a protected category, to “touching on rights that, like a rising tide, will lift the boat of every person in America.”³⁵

Borrowing elements from these definitions, this Article generally defines universalism as the phenomenon of deemphasizing legal or policy approaches that specifically target race-based inequality and instead emphasizing a baseline of commonalities related to the human condition. Though universalism targets non-identity based characteristics, universalism is posited as being capable of doing

32. See, e.g., Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (discussing the pitfalls of anti-discrimination jurisprudence and touting the benefits of universalism within the context of employment law); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013) (advocating for universalist approaches towards voting rights).

33. Bagenstos, *supra* note 29, at 2842.

34. Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1240 (2011).

35. YOSHINO, *supra* note 28, at 192.

race-sensitive work because of the many glaring racial disparities that are deeply entrenched within society. As Professor Yoshino suggests, by applying a universalist policy to issues where glaring racial inequalities exist, universalism has the potential to allow the rising tide to lift all boats, including the boats of marginalized people of color.³⁶

B. Advantages of Universalism

Using this definition, universalism is championed as affording three primary forms of advantages over race-specific approaches: Tactical advantages, substantive advantages, and expressive advantages.³⁷ With respect to the tactical advantages, universalist policies are posited as being able to obtain political support and avoid backlash, particularly backlash steeped in racial resentment.³⁸ Universalism is also theorized as being more palatable to people who would otherwise object to a policy that is intended specifically to address a specific group based on identity.³⁹

The tactical arguments in favor of universalism are particularly salient given the uptick in “post-racialism.” Post-racialism is generally defined as “a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America’s and Americans’ pronounced racial progress.”⁴⁰ Central to the ideology of post-racialism is the belief “that governments—both state and federal—should not consider race in their decision making.”⁴¹ Post-racialism ideology has recently come to play a central role in the public discourse on race, particularly after the election of the country’s first African-American president.⁴² In light of the central role that post-racialism is playing in the public discourse, the potential tactical advantages of using universalist approaches to remedy racial disparities in public education are evident.

An example of this can be seen with race-conscious affirmative action policies.⁴³ Currently, race-conscious affirmative action policies garner resentment and are the subject of ongoing legal challenges.⁴⁴ In contrast, universalist forms of

36. *Id.*

37. See generally Bagenstos, *supra* note 29.

38. *Id.* at 2848.

39. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794–95 (2011) (arguing that universalist policies have the potential to resonate with broader swaths of people who otherwise might have equality fatigue).

40. Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 968 (2010).

41. *Id.*

42. See, e.g., Daniel Schorr, *A New Post-Racial Era in America*, NAT’L PUB. RADIO (Jan. 28, 2008), <https://www.npr.org/templates/story/story.php?storyId=18489466> (extolling the possibility of a post-racial future after the success of then-Senator Barack Obama).

43. For a discussion of the genesis and evolution of race-conscious affirmative action programs, see Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 311–24 (2017).

44. See, e.g., Sheryll Cashin, *Place, Not Race: Affirmative Action and the Geography of Educational Opportunity*, 47 U. MICH. J. L. REFORM 935, 944–51 (2014) (describing the legal challenges and political backlash to race-based affirmative action); Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 15, 2018), <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action> (chronicling the history of race-based affirmative action and a more recent legal challenge to race-based affirmative action being waged by Asian-American plaintiffs).

affirmative action that target groups not based on their identity, but based on human conditions, such as poverty, receive more support from the public and face fewer legal and political challenges.⁴⁵

A second argument in favor of universalist approaches is substantive. The substantive argument portends that universal policies are more effective than race-specific laws or policies⁴⁶ in addressing inequality and discrimination typically seen as civil rights issues. Universalist policies are said to succeed where race-specific laws or policies fail insofar as, among other things, they do not require a showing of intent to discriminate, a nearly impenetrable barrier for many race-conscious laws or policies aimed at remedying racial disparities.⁴⁷ Put another way, race-specific laws or policies often require the state or some other bad actor to have intentionally discriminated against an individual or group of individuals *because of* their membership in a protected identity class in order to pass constitutional muster.⁴⁸ Such evidence of intentional discrimination is extraordinarily hard to find and prove.⁴⁹ Race-specific laws or policies thus have doctrinal requirements that are difficult to meet.⁵⁰ In contrast, universalist policies can be drafted so that they are race-neutral and do not encounter the intent to discriminate doctrinal hurdle.⁵¹

Consider for example racial segregation in schools. To successfully challenge the constitutionality of racial segregation in public schools, one must demonstrate that the segregation is the result of intentional state action, not the byproduct of some factor ostensibly outside the control of the state, like residential segregation.⁵² As a result, even when schools are clearly segregated by race, courts

45. See, e.g., Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037 (1996) (making a moral, political, and legal case for a system of class-based affirmative action on universalist grounds); Richard Kahlenberg, *Affirmative Action Should Be Based on Class, Not Race*, ECONOMIST, (Sep. 4, 2018), <https://www.economist.com/open-future/2018/09/04/affirmative-action-should-be-based-on-class-not-race> (describing the political support for class-based affirmative action, noting that “[a] 2016 Gallup poll found that while 63% of Americans oppose colleges using race as a factor in admissions, 61% favour consideration of family economic circumstances.”).

46. I use the term “race-specific” in this context to mean laws or policies that either confer benefits or prohibit discrimination to individuals based on their race.

47. Bagenstos, *supra* note 29, at 2857 (describing the ways in which race-conscious laws aimed at stamping out voting policies that restrict the right of people of color to vote are stymied by the requirement of showing intent to discriminate on the basis of race and noting that “the difficulty in proving intentional discrimination exists throughout civil rights law.”).

48. See generally *Washington v. Davis*, 426 U.S. 229 (1976) (requiring plaintiffs challenging a racially neutral law to show intent to discriminate in the enactment or administration of the law); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (describing how the intent to discriminate requirement serves as a barrier to addressing racial inequality and proposing alternative legal standards to be applied to antidiscrimination laws).

49. See Eyer, *supra* note 32, at 1293 (noting that “[a]cross a wide variety of contexts, psychology scholars have found a pronounced unwillingness to make attributions to discrimination, even in the presence of quite compelling facts.”).

50. *Id.*

51. Bagenstos, *supra* note 29, at 2856–57 (arguing that universalist policies could be drafted so that they “uniformly prohibit[] certain actions that are often discriminatory without requiring proof of discrimination in any individual case.”).

52. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 115 (1995) (Thomas, J., concurring) (“[T]he mere fact that a school is black does not mean that it is the product of a constitutional violation. A ‘racial imbalance does not itself establish a violation of the Constitution.’”).

often find that they lack the remedial authority to address the segregation because the plaintiff failed to show that the segregation was the result of intentional state action.⁵³ Thus, race-specific laws or policies, like antidiscrimination laws, are proving to be ineffective in addressing racial segregation in schools, leading to calls for more universalist policy solutions in their place.⁵⁴

The third argument levied in favor of the advantages of universalist policies is expressive. The purported expressive advantage of universalist policies lies in their message. The primary argument put forth here is that “targeted civil rights laws . . . depend on and feed essentializing stereotypes about the characteristics of members of particular groups.”⁵⁵ In contrast, universalist policies are said to be less likely to essentialize identity and more likely to convey a message of human dignity that is less divisive and that all people can support.⁵⁶

While universalism offers advantages, there are also several critiques of universalism. Some scholars suggest that the turn towards universalism runs the risk of reifying the notion that society is post-racial, thereby making it difficult to successfully advance race specific discrimination claims.⁵⁷ Professor John A. Powell warns against a phenomenon he calls “false universalism.”⁵⁸ According to Professor Powell, “false universalism” occurs because universal programs alone cannot remedy racial disparities because not all persons, particularly persons from marginalized groups, are similarly situated and similarly able to reap the benefits of universal programs.⁵⁹ As discussed in the Sections that follow, while the turn towards universalism has the potential to reap some of the advantages, the critiques of universalism in the context of public education are also worth heeding.

C. Implications of Universalism in Public Education

The tactical, substantive, and expressive advantages of universalism seem particularly appealing in the context of public education. At the heart of the Supreme Court’s decision in *Brown v. Board of Education* was the recognition that racially segregated schools are detrimental to Black children, depriving them of

53. See, e.g., *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1349 (11th Cir. 2005) (finding that although schools were racially segregated, “the burden rests with the Plaintiffs to demonstrate that the District acted with discriminatory purpose,” and Plaintiffs failed to meet that burden).

54. See, e.g., Jelani Cobb, *The Failure of Desegregation*, NEW YORKER, (Apr. 16, 2014), <https://www.newyorker.com/news/news-desk/the-failure-of-desegregation> (arguing that court-led school desegregation efforts have not been successful and that “[t]o the extent that desegregation becomes, once again, a pressing concern—and even that may be too grand a hope—it will have to involve the tax code, the minimum wage, and other efforts to redress income inequality”).

55. Bagenstos, *supra* note 29, at 2863.

56. *Id.* at 2864 (noting that universalism advocates contend that universalist policies can “help to build social solidarity across group lines”).

57. See, e.g., Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 53 (2016) (“When litigators turn to universalism as a pragmatic, strategic choice, rather than because of faith in the substantive ideology that informs this outlook, they strengthen the persuasive hold that post-racialism already has on segments of the American public; discipline plaintiffs to re-interpret their injuries in a race neutral fashion; and cause Title VII case law on race to stagnate in ways that make it more difficult to bring future race discrimination claims.”).

58. See John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785 (2009).

59. See *infra* Section IV.C.

access to the same kind of education that white children receive.⁶⁰ After decades of litigation and federal intervention, in many ways, *Brown* came to symbolize equal access, or stated differently, that all children should be entitled to racially equal access to public schools.⁶¹

Yet eventually the normative understandings of the meanings of racially segregated schools changed. The sense of urgency with respect to school desegregation, and the implicit promise of *Brown* that children should be entitled to racially equal access to public schools, was lost.⁶² The Supreme Court put an explanation mark on this shift when it struck down as unconstitutional a voluntary school desegregation plan aimed at preventing school resegregation, reasoning in part that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁶³ Thus, race-specific laws and policies aimed at providing racially equal access to public schools are now unpopular both as a matter of law and public opinion.⁶⁴

Instead, a new method of addressing the realities of racially unequal access to public schools is being formulated. Market-based reforms like charter schools are being situated as a race-neutral universalist solution to providing racially equal access to public schools. However, given the ways in which access to public education has functioned as a key instrument in perpetuating white supremacy and Black subordination,⁶⁵ universalist policies as a means of addressing racial inequality in public schools are falling short. The Part that follows chronicles the rise of charter schools as a universalist approach towards achieving racially equal access to public schools.

III. CHARTER SCHOOLS AS A MARKET-BASED UNIVERSALIST SOLUTION

A. School Desegregation and Judicial Retrenchment

Decades after *Brown v. Board of Education* the Supreme Court took an aggressive stance towards eliminating racially identifiable schools, or schools that were easily identifiable as an all-Black or all-white school.⁶⁶ The Court’s decision in *Brown* made it clear that given the history of race and racial subordination, racially identifiable schools were essentially incapable of providing racially equal

60. 347 U.S. 483, 493 (1954) (“Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”).

61. See, e.g., Kimberly J. Robinson, *Resurrecting the Promise of Brown: Understanding and Remediying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 811–37 (2010).

62. See JOHN C. BOGER, *Brown and the American South*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 305, 311 (2005) (noting a “drift away from integrated public schooling and [a] deeper loss of urgency about integrated public institutions”).

63. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007)

64. BOGER, *supra* note 62, at 305.

65. See generally KIRSTEN L. BURAS, *CHARTER SCHOOLS, RACE, AND URBAN SPACE: WHERE MARKET MEETS GRASSROOTS RESISTANCE* (2015) (describing the ways in which public education was used as a tool of racial subordination in the South).

66. 347 U.S. 483 (1954).

access to public schools.⁶⁷ Thus, implicit in the Court's aggressive stance was a quest to ensure that all students had racially equal access to public schools. To that end, the Court rejected gradual plans to desegregate that would leave racially identifiable schools standing and subject Black students to receiving inferior educational opportunities.⁶⁸ The Court also struck down as unconstitutional freedom of choice plans that served as invisible barriers to Black students' ability to attend quality schools on a racially equal basis.⁶⁹ Finally, the Court sanctioned aggressive practices such as bussing⁷⁰ and racial balancing⁷¹ to ensure that Black students had racially equal access to public schools. The Court's decisions during this period had the effect of hastening school desegregation and taking an important step towards fulfilling *Brown*'s promise of racially equal access to public schools.

Despite the Court's initial aggressive stance towards desegregation, ultimately the Court's school desegregation jurisprudence retrenched substantially. Beginning in the mid-1970's, the Court more narrowly read the scope of its constitutional authority to fashion remedies that would make available racially equal access to public schools.⁷² As I and other scholars have argued, much of the Supreme Court's modern school desegregation jurisprudence re-constitutionalized racial segregation in schools.⁷³ It did so by decontextualizing the significance of racially identifiable schools and taking an ahistorical view of the harms of racially identifiable schools.⁷⁴

Particularly noteworthy is a series of cases decided by the Supreme Court in the 1990s in which the Court found that much of the segregation and inequality in schools is the result of private choices of individuals regarding where they wanted

67. *Id.* at 495 (1954) ("[W]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

68. *See, e.g.*, *Rogers v. Paul*, 382 U.S. 198, 200 (1965) (rejecting as unconstitutional a school desegregation plan that would desegregate only one grade at a time and instead finding that Black students "shall be allowed immediate transfer to the high school that has the more extensive curriculum and from which they are excluded because of their race").

69. *See Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, 441–42 (1968) (finding that a freedom of choice plan was unconstitutional because "[r]ather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board.")

70. *See United States v. Montgomery Cty. Bd. of Educ.*, 395 U.S. 225, 234–35 (1969).

71. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30–31 (1971).

72. *See, e.g.*, *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249–50 (1991) (finding that a school system could be released from a federal court school desegregation order if it could show that it "complied in *good faith* with the desegregation decree since it was entered" and "the vestiges of past discrimination had been eliminated to the extent practicable") (emphasis added); *Milliken v. Bradley*, 418 U.S. 717 (1974) (severely limiting the remedial authority of federal courts to issue desegregation orders between urban and suburban school districts by requiring a finding that there was both an interdistrict violation and an interdistrict effect).

73. *Robinson, supra* note 22, at 811–37.

74. Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 163 (2016) ("[T]he Supreme Court's understanding of what it means to return to racially identifiable schools is completely divorced from the reality of the ways in which race functions in America both as a historical marker of past injustices and, more likely than not, as a present indicator of ongoing marginalization and subordination. As a result of this jurisprudence, racial segregation in schools is not only legally normalized but socially normalized as well.").

to live.⁷⁵ Though the Court acknowledged that the schools in the cases were racially identifiable, the Court diminished the legal significance of this aspect by pointing to private choice rather than state action as the reason for the schools being racially identifiable.⁷⁶ By emphasizing the role of individual choice rather than state action in creating racial segregation, the Court signaled to many that the judiciary would no longer be a part of improving schooling options, particularly for students of color.⁷⁷

B. Harms Caused by Judicial Retrenchment in School Desegregation Cases

The net result of the Supreme Court's retrenchment was a resegregation of public schools across the country.⁷⁸ Along with the resegregation, racially unequal access to quality public schools also emerged.⁷⁹ Students of color, particularly Black and Latino students, currently have racially unequal access to high quality schools.⁸⁰ Owing in large part to a history of racial subordination, schools that are predominately non-white are less likely to have access to high quality educational inputs.⁸¹ Schools that are predominately non-white are also more likely to contain

75. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts."); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249–50 (1991) (articulating the standard for releasing a school district from federal court supervisions of "whether the vestiges of past discrimination had been eliminated to the extent practicable," and finding that residential segregation that is the result of private choices made by individuals is beyond the scope of the articulated standard).

76. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995) ("The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions.").

77. See, e.g., Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63, 69 (1992) (describing federal court and Supreme Court cases that used individual choice "to justify the continued existence of inequality between blacks and whites"); Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1404 (1995) (noting that lower court judges have accepted "housing segregation as unrelated to school desegregation and essentially private, they are likely to conclude that school officials may accept a 'natural' spread of residential segregation occurring through private choice and not public action, and therefore to accept the spread of school segregation as natural").

78. See generally ORFIELD & LEE, *supra* note 22, at 5 (finding that "resegregation, which took hold in the early 1990s after three Supreme Court decisions from 1991 to 1995 limiting desegregation orders, is continuing to grow in all parts of the country for both African Americans and Latinos and is accelerating the most rapidly in the only region that had been highly desegregated—the South.").

79. See generally Derek W. Black, *Middle-Income Peers As Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. Rev. 373 (2012) (describing the structural factors that lead to poor students of color having limited access to high quality schools).

80. *Id.* at 418–38 (demonstrating through empirical evidence that Black and Latino students are assigned to schools with fewer middle-class students, which correlates with the schools they attend having less access to quality educational inputs).

81. Orfield et al., *supra* note 9, at 102 ("While there are examples of academically successful schools with high concentrations of nonwhite students, more often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability caused by rapid turnover of faculty, fewer educational resources, and limited exposure to peers who can positively influence academic learning.").

a high number of students living in poverty, which negatively impacts both the educational inputs they receive and their educational learning outcomes.⁸²

For example, schools that have a student body that is predominately minority and low-income have a harder time retaining highly qualified teachers.⁸³ Schools that are predominately minority also tend to offer a less rigorous curriculum⁸⁴ and have lower academic achievement indicators.⁸⁵ Further, schools that contain a majority minority student body are less likely to have adequate physical facilities.⁸⁶ In contrast, schools that are predominately white are more likely to have low levels of poverty and high quality educational inputs.⁸⁷

Racially unequal access to public schools occurs in part because of the way in which public education is delivered, particularly the way in which students are assigned to schools. Students are assigned to attend public schools in accordance with where they live.⁸⁸ White families are more likely to have the financial means to “shop” for schools that offer the best curriculum and highest quality teachers.⁸⁹ White families “shop” by either moving into a neighborhood that will allow them to attend a high performing school⁹⁰ or opting out of public school and paying for private school.⁹¹ Low-income families of color, in contrast, are likely to face constraints that impede their ability to “shop” for higher performing, better quality

82. *Id.* at 127 (“As a result of teacher and resource disparities – important educational conditions for student success – district and metropolitan area case studies examining segregated minority schools find lower achievement in these schools. A study of schools in metropolitan Boston, for example, shows that only 61 percent of tenth-grade students in high-poverty, high-minority schools passed the English/Language Arts graduation test in the 2002–03 school year compared to 96 percent of students attending low-minority, low-poverty schools.”).

83. See Black, *supra* note 79, at 405 (noting that predominately poor and minority schools find it “extremely difficult to attract high-quality teachers. Even when they do secure quality teachers, predominately poor and minority schools find it difficult to retain them. The best teachers often leave high-poverty, high-minority schools as soon as they obtain sufficient experience.”); Orfield et al. *supra* note 9, at 106 (“Due in part to higher teacher turnover, African American and Latino students in predominantly minority schools typically have a greater proportion of teachers who are inexperienced and have lesser qualifications.”).

84. Amici Brief of 553 Social Scientists, *supra* note 7, at *33a (“Research suggests that curricular resources, including honors and AP courses, are not equally available for schools serving larger shares of minority students.”).

85. See *id.* at *3 (“[M]easures of educational outcomes, such as scores on standardized achievement tests and high school graduation rates, are lower in schools with high percentages of nonwhite students.”).

86. See *id.* at *11 (“Research consistently shows that schools with higher percentages of minority students have fewer educational resources, such [as] . . . inadequate facilities.”).

87. See, e.g., Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATL., (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414>.

88. See generally Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495 (2010) (describing the connection between residence and school assignment, as well as the ways in which it causes race and class-based stratification in schools).

89. See *id.* at 501.

90. See Wilson, *supra* note 74, at 192 (“[T]hose who are more affluent and/or have greater social and political capital can shop for a municipality that best meets their needs, particularly when it comes to schools.”).

91. See S. EDUC. FOUND., RACE AND ETHNICITY IN A NEW ERA OF PUBLIC FUNDING 19 (2016) (finding that “the percentage of white enrollment in private schools exceeded the percentage of whites among the nation’s school-age children by 15 percentage points.”).

schools. Such constraints may include, but are not limited to, lacking the financial means to move into neighborhoods that have high quality schools,⁹² racial discrimination in the housing market that impedes their residential mobility,⁹³ or other social ties that may bind them to a neighborhood with lower quality schools.⁹⁴

C. Charter Schools as a Universalist Solution

Market-based reforms as advanced through charter schools ostensibly address the aforementioned uneven ability of parents to “shop” for schools by allowing low-income families of color to choose which schools their children attend.⁹⁵ Charter schools also have the ability to decouple residence from school assignment such that the racial segregation in neighborhoods does not have to be replicated in public schools.⁹⁶ As a result, parents of color are increasingly looking to school choice as a means of improving the educational opportunities available for their children.⁹⁷ Indeed, school choice and charter schools have become a rallying cry for some parents of color frustrated with the failure of the courts to deliver on *Brown*’s implicit promise of racially equal access to public schools for all children.⁹⁸

92. See, e.g., Jonathan Rothwell, *Housing Costs, Zoning, and Access to High Scoring Schools*, BROOKINGS 21 (Apr. 2012), https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf (finding that “[a]ccess to high-scoring schools is unequal by income and race because that access is constrained by housing availability and cost.”).

93. See, e.g., U.S. DEP’T OF HOUS. AND URB. DEV., OFFICE OF POL’Y DEV. AND RES., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 1 (2012) https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf (finding that “[a]lthough the most blatant forms of housing discrimination (refusing to meet with a minority homeseeker or provide information about any available units) have declined since the first national paired-testing study in 1977, the forms of discrimination that persist (providing information about fewer units) raise the costs of housing search for minorities and restrict their housing options.”); J. Brian Charles, *Despite Legal Protections, Black Families Face Housing Discrimination*, GOVERNING THE STATES AND LOCALITIES (Mar. 28, 2018), <http://www.governing.com/topics/urban/gov-black-families-discrimination-rental-market-1c.html> (noting that “studies in different cities have shown that black families still face routine discrimination when they attempt to use federal housing vouchers to rent an apartment.”).

94. Wilson, *supra* note 74, at 193 (arguing that “for many poor and minority families, the municipality or neighborhood in which they live is not necessarily based on an intentional and well-calculated choice. Instead, such families are often forced to locate to a community that is most affordable or offers the kinds of support networks that they need in order to subsist.”).

95. *Id.* at 192–93.

96. See, e.g., Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 795 (2005) (arguing that “school choice can and should be used to promote desegregation.”); Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH. J. RACE & L. 321, 334–35 (2011) (describing the ways in which school choice reform has been tethered to increasing diversity and integration in public schools).

97. See, e.g., Camille W. Cooper, *School Choice and the Standpoint of African American Mothers: Considering the Power of Positionality*, 74 J. NEGRO EDUC. 174, 181–86 (2005) (describing the ways in which African-American mothers utilized school choice reforms and noting that for many of the mothers “school choice making serves as a form of sociopolitical and cultural resistance.”).

98. See, e.g., Reid, *supra* note 23.

A significant normative underpinning of universalism is that the benefit of the universal policies will disproportionately accrue to members of marginalized groups because of the disparities faced by those marginalized groups.⁹⁹ Within the context of public schools, the universalist argument suggests that market-based reforms generally, and charter schools specifically, will remove the residentially based barriers to high quality schools for all students.¹⁰⁰ Charters are in turn theorized as being more likely to have a greater impact on students of color—in terms of increasing the number of quality school options available to them—because they are more likely to be confined to high poverty, low achieving schools because of the nexus between residence and school assignment.¹⁰¹

From a tactical perspective, the universalist argument for charter schools appears sound. Charter schools are in theory available to all students. As such, they can gain widespread support from all corners, from conservative free-market supporters to low-income parents of color attempting to obtain a better education for their children.¹⁰²

Similarly, from a substantive perspective, to the extent the connection between residence and school assignment is a significant driver of racially unequal access to public schools, charter schools can provide racially equal access to public schools by disentangling school assignment from residence. More importantly, charter schools can do so without being bogged down by the doctrinal difficulties that race-specific laws face within the context of the Supreme Court's school desegregation jurisprudence.

Finally, from an expressive position, charter schools send the message that all students should have access to public schools that offer a high-quality education. Charter schools convey this message without suggesting that students of color need white students in their schools to receive a high-quality education, a message that worries critics of race-specific laws aimed at fostering desegregation.¹⁰³

While charter schools are well positioned to utilize the advantages of a universalist solution to ensuring racially equal access to public schools, critiques

99. *See supra* Part II.

100. *See, e.g.*, Jonathan Chait, *Charters Didn't Cause Segregation. They're a Solution For Its Victims.*, N.Y. MAG., (Dec. 8, 2017), <http://nymag.com/intelligencer/2017/12/charter-didnt-cause-segregation-they-help-its-victims.html?gtm=bottom>m=bottom> (critiquing the system of public education that ties school assignment with residence and arguing that charter schools are a way of ameliorating the problems caused by the system of neighborhood schools). *But cf.* Jon Valant & Jane Arnold Lincove, *The Barriers that Make Charter Schools Inaccessible to Disadvantaged Families*, BROOKINGS (Mar. 16, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/03/16/the-barriers-that-make-charter-schools-inaccessible-to-disadvantaged-families> (noting that “[c]harter schools have the potential to expand families’ tuition-free options, closing the gap in school choices between wealthier and poorer families. However, they only expand families’ options if they are genuinely accessible—not just technically available. An assortment of barriers can get in the way.”).

101. *See, e.g.*, Chait, *supra* note 100.

102. *See generally* Sarah Reckhow et al., *Policy Cues and Ideology in Attitudes toward Charter Schools*, 43 POL'Y STUD. J. 207 (2015) (describing public support for charter schools and analyzing how partisanship and ideology impacts support for charter schools).

103. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (critiquing a district court's aggressive plan to desegregate a school system, noting that “[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. Instead of focusing on remedying the harm done to those black schoolchildren injured by segregation . . . ”).

of the impact that charter schools have on racial segregation and racial inequality in public schools are plentiful. The primary substantive critiques of charter schools' impact on racial inequality are that charter schools exacerbate racial segregation within schools¹⁰⁴ and that they suspend Black students at higher rates, often pushing out students who are more difficult to educate, particularly students with disabilities.¹⁰⁵ As discussed in the Part that follows, these critiques are consistent with what I deem the fatal flaw inherent in using a market-based universalist solution in order to ensure racially equal access to public schools: Race warps markets generally and the market for public education specifically, thereby reifying rather than ameliorating racially unequal access to public schools.

IV. CHARTERS SCHOOLS AND FALSE UNIVERSALISM

A. Charters and Sub-Optimal Market Conditions

Charter schools are often situated as a potentially effective race-neutral universal solution to improving the schooling options for low-income students of color.¹⁰⁶ Despite charter schools' potential to take advantage of the tactical, substantive, and expressive advantages inherent in universalist solutions, they often fall short. They fall short because race creates sub-optimal conditions within education markets and leads to a collective action problem. As a result, rather than being an effective universalist pathway to offering racially equal access to public schools, charter schools are in some instances exacerbating rather than ameliorating the problem of racially unequal access to schools. The paragraphs that follow describe these problems in further detail.

A key reason that charters fall short of being an effective universalist solution is because of the way in which race operates within the context of markets. Central to the push for market-based public-school reforms, including charter schools, is the notion that extrapolating the strictures of the free-market to public education will result in an efficient allocation of public schools, including serving the universalist goal of allowing for racially equal access to public school.¹⁰⁷

Importantly, the free-market is said to best effectively allocate resources when certain optimal market conditions are met.¹⁰⁸ In the context of public schools, those optimal market conditions include full or perfect information such that parents have the relevant information necessary to make a utility maximizing choice; mobility in terms of being able to move between schools; competition between

104. FRANKENBERG ET AL., *supra* note 26, at 4 (examining charter school enrollment nationwide and finding that “nearly three out of four students in the typical black student’s charter school are also black.”).

105. DANIEL J. LOSEN ET AL., C.R. PROJECT, CHARTER SCHOOLS, CIVIL RIGHTS AND SCHOOL DISCIPLINE: A COMPREHENSIVE REVIEW 11 (2016) (finding that “[m]ore than 500 charter schools had a Black-White suspension gap of more than 10 points . . . [and] [t]hat same gap was found between students with disabilities and their non-disabled peers in 1,093 charter schools.”).

106. See, e.g., Siegel-Hawley & Frankenberg, *supra* note 96, at 334–35 (describing the ways in which school choice reform has been tethered to increasing diversity and integration in public schools); *see also* Liu & Taylor, *supra* note 96 (arguing that “school choice can and should be used to promote desegregation.”).

107. *See supra* Part III.

108. *See* Le Grand, et al. *supra* note 10, at 31.

schools; and unconstrained choice.¹⁰⁹ When those optimal market conditions are met, free-market theorists suggest that an efficient allocation of high quality public schools will occur. They also suggest that individuals will make rational decisions to maximize their own utility and choose the best school for their children.¹¹⁰

Yet race within the context of a market for public education creates sub-optimal market conditions that impede allocative efficiency. With respect to mobility for example, low-income parents of color typically do not have unfettered mobility to move between schools.¹¹¹ Even when school assignment is disentangled from residence, other factors such as a schools' failure to provide transportation or free or reduced lunch may in reality limit a parent's mobility in terms of what school they can select for their child.¹¹²

Moreover, in terms of full information, parents of color often do not have close to perfect or full information. Instead, they often lack access to the data that would allow them to make utility maximizing decisions in choosing a public school.¹¹³ Parents of color in low-income schools may also be overly reliant on school district officials to provide relevant information about their choices.¹¹⁴ Power differentials between parents and the district may lead to parents being disempowered to press for the full information that they need to make an informed choice.¹¹⁵ Indeed, parents in some instances have found that obtaining information about school choice is easier to obtain via word of mouth from people in their social networks.¹¹⁶ Complicating the issue of obtaining information via word of mouth is that parents across all races tend to rely on their own social networks to determine what constitutes a quality school.¹¹⁷ To the extent that the networks of low-income

109. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956) (describing the optimal conditions necessary for efficient markets including full information for consumers, no limits on mobility, and competition); CHUBB & MOE, *supra* note 11.

110. Le Grand, et al., *supra* note 10, at 65.

111. See, e.g., James, *supra* note 31, at 1104 ("[T]he choices of poor, working class, and minority students and their families in the education market are severely limited. Community bias against these groups, for example, is often reflected in local policies like zoning for multi-family housing that can limit access to particular schools—charter and voucher schools included.").

112. Helen F. Ladd, Charles T. Clotfelter & Mavzuna Turaeva, *Choosing Charter Schools in North Carolina: What Do Parents Value?* 32–37 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Res., Working Paper No. 196-0618-1, 2018), <https://caldercenter.org/publications/choosing-charter-schools-north-carolina-what-do-parents-value> (documenting how the provision of transportation and lunch services affect parental choice of schools).

113. See, e.g., Cooper, *supra* note 97, at 183 (describing the challenges African-American mothers face in obtaining data and information regarding school choice options, including a lack of awareness about the charter school options available to them).

114. *Id.* at 180.

115. *Id.* at 181 (summarizing interviews with African-American mothers who described the process of obtaining information about school choice as "hard" and "discouraging," and stated that they "lack adequate information about their options, for which they blame the district [and] pointed to their race and class as being aspects of their positionality that disadvantage them when choosing schools.").

116. *Id.* ("[M]others agreed that obtaining information about their school choice options via word-of-mouth is often easier than getting it from district officials.").

117. See, e.g., Amy S. Wells & Allison Roda, *School Choice Policies and Racial Segregation: Where White Parents' Good Intentions, Anxiety, and Privilege Collide*, 119 AM. J. EDUC. 261, 280 (2013) (describing the ways in which upper-class white parental social networks were utilized to help parents obtain information necessary to choose schools).

parents of color are filled with other low-income parents of color, the information they have may not be as robust as the information that more affluent and typically white parents have.¹¹⁸

In addition, competition between schools may be less likely to occur in areas populated primarily by low-income residents of color. Indeed, in many low-income majority minority neighborhoods, there is a long wait list for what are deemed high quality charter schools.¹¹⁹ However, the wait lists and high demand may be evidence of deprivation of any public school options wrought by the closing of traditional public schools and creation of education deserts rather than true competition.¹²⁰ In fact, if genuine competition were present between various high-quality charter and public schools, one might expect to find *fewer* waiting lists and more schools actively recruiting parents and students.

Finally, critical to the notion that free market principles will result in an efficient allocation of goods is the idea that actors within any market will behave rationally insofar as they seek to maximize their utility. Nonetheless, when it comes to selecting public schools, research shows that parents often do not behave rationally.¹²¹ Instead, parents often select schools based on irrational and non-utility maximizing factors such as race.¹²² This is problematic because “a market in which parents select schools based mostly on racial composition, instead of objective measures of academic excellence, is not really an education market, but rather a racialized social market playing out in the sphere of public education.”¹²³

B. Charters and the Collective Action Problems

The injection of race into the education market also creates a collective action problem. By collection action problem, I mean a situation in which a group fails to make a choice that will lead to the best collective outcome for the entire group because individual members of the group perceive the cost of collective action to

118. *Id.*

119. In places like Harlem, New York, for example, a select few charter schools are in high demand and command sizable waitlists. *See, e.g.*, Press Release, Success Academies, After Success Academy’s Annual Lottery 14000 Children are on Left on Waitlist (Apr. 6, 2017) <https://www.successacademies.org/press-releases/after-success-academys-annual-lottery-14000-children-are-left-on-waitlist> (noting that “[m]ore than 17,000 children were entered into yesterday’s admissions lottery for 3,017 available seats at Success Academy in 2017–18. Parents from every corner of New York City applied, driven by a severe shortage of high-quality schools and the network’s decade-long track record of achievement. This is the fourth consecutive year the Success wait list exceeds 10,000 kids.”).

120. Matthew P. Shaw, *Creating the Urban Educational Desert Through School Closures and Dignity Taking*, 92 CHI. KENT L. REV. 1087, 1089 (2017) (describing how the closure of traditional public schools in Chicago created vast educational deserts, defined as “an absence of available, safe, opportunity-yielding educational options.”).

121. *See, e.g.*, Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL’Y 1 (2008).

122. *Id.* at 21–23 (summarizing the results of empirical qualitative and quantitative studies of the impact of race on school selection in a public-school choice program and noting that “interviewees acknowledged that they rejected schools based on their racial composition or location in black neighborhoods. One mother rejected the entire transfer process based on her perception that she could use it only to send her child to a black school or a school in a black neighborhood.”).

123. James, *supra* note 31, at 1105.

outweigh the benefit to them individually.¹²⁴ Put another way, the collective action problem results in “individual members of a group, by pursuing their own short-term self-interest, act[ing] in a manner that makes every member worse off in the long run.”¹²⁵

Within the context of public education, research shows that integrated schools work best for *all* students.¹²⁶ Research also shows that integrated schools produce more capable workers and citizens.¹²⁷ Nonetheless, public schools continue to be racially segregated. This is in large part due to white parents’ collective tendency to resist public school integration efforts when given a choice.¹²⁸ Because whites have historically held positions of power, wealth, and access to other tangible and intangible resources, an all-white or predominately white school has a totally different connotation than a school that is primarily attended by students of color. Indeed, schools that are predominately white are more likely to have quality educational inputs that allow students to obtain a quality education.¹²⁹ Further, research suggests that a school may be perceived as being of higher quality if there are fewer students of color and more white students, thereby providing a social incentive for white parents to avoid sending their children to schools with high numbers of students of color.¹³⁰

Thus, although integrated schools are good for all students, white parents/students can benefit from opting-out of integrated public schools and creating predominately white public school enclaves. The benefits they receive from opting out of integrated public schools results in a collective action problem that market-based reforms like charter schools are ill-equipped to prevent. To the contrary, white parents as a collective have used market-based reforms like charter

124. See, e.g., Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1971) (arguing that rational, self-interested individuals will not act to further group interests without coercion or other incentives).

125. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 74 (2007).

126. See, e.g., *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, CENTURY FOUND. (Feb. 10, 2016), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms> (summarizing research showing that integrated schools lead to greater academic and cognitive benefits for all students including higher test scores, lower racial achievement gaps, and a reduction of racial bias).

127. *Id.*

128. See, e.g., STEVEN GLAZERMAN & DALLAS DOTTER, *MATHEMATICA POL’Y RES., MARKET SIGNALS: EVIDENCE ON THE DETERMINANTS AND CONSEQUENCES OF SCHOOL CHOICE FROM A CITYWIDE LOTTERY* (2016) (documenting the ways in which race and income impacted parental choice in schools and noting that white and higher-income applicants had the strongest preferences for their children to be in the racial majority, while black elementary school parents were essentially “indifferent” to a school’s racial makeup); Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of Desegregation Plans?*, 12 J. LEGAL STUD. 69, 80–94 (1983) (examining the relationship between school desegregation and white flight).

129. See e.g., Linda Darling-Hammond, *supra* note 12.

130. For example, a controversy arose in Riverside, California after parents at a predominately white school objected to renaming the school after Martin Luther King, Jr. Chief amongst the objections was the fear that people would think the school was a predominately Black school and diminish their chance to get into elite colleges because of the perceived status of a predominately Black high school. See Derek H. Alderman, *School Names As Cultural Arenas: The Naming Of U.S. Public Schools After Martin Luther King, Jr.*, 23 URB. GEOGRAPHY 7 (2002).

schools to opt-out of more racially diverse school systems and to form their own predominately white charter school enclaves.¹³¹ Consequently, market-based reforms as advanced by charter schools end up falling short of the universalist goal of bringing about racially equal access to public education. Instead, as described in the Section that follows, market-based reforms as advanced by charter schools run the risk of propagating what scholars have called “false universalism.”

C. Charters and False Universalism

False universalism is a critique of universalism fashioned by Professor John A. Powell.¹³² According to Professor Powell universalism suffers from a conceptual flaw insofar as it fails to account for the reality that “groups of people are differently situated in relation to institutional and policy dynamics.”¹³³ Put another way, universalism fails to account for the reality that marginalized and non-marginalized groups “are not similarly situated.”¹³⁴

For instance, Black people suffer from “cumulative causation or mutual reinforcing restraint,” due in large part to their history of being racially subordinated and excluded from economic, political, and social opportunities.¹³⁵ Consequently, Blacks as a group suffer from multiple forms of marginalization that reduce their opportunities.¹³⁶ A universalist policy that addresses one or even two forms of the marginalization will not be enough to change the conditions faced by the group as a whole.¹³⁷ Instead, a small number of people within the group may gain greater opportunities on an individual level, but the group will not. Further, when the conditions of the group do not improve, questions will arise not about the efficacy of the universalist policy, but about the group itself.¹³⁸ This has the effect of reifying rather than ameliorating group-based racial inequality.

Market-based reforms, as advanced through charter schools, provide a good example of how false universalism is being propagated by a universalist solution. Charters schools are positioned as a universalist policy of ensuring racially-equal access to public schools for all students. But because of sub-optimal market conditions and the collective action problem that race interjects into education markets, charters have the effect of providing racially *unequal* access to the public. Some white students¹³⁹ and a small number of students of color are taking advantage of quality charter schools to receive a better education than they

131. *See generally* Wilson, *supra* note 74 (describing the ways in which white parents are using school choice to create white charter school enclaves in predominately minority school districts).

132. *See generally* Powell, *supra* note 58 (coining the term “false universalism”).

133. *Id.* at 796.

134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.*

138. *See id.* (arguing that the failure of the group to translate the policy into opportunity might be viewed as a failure on the part of group and not a failure of policy).

139. *See* Emmanuel Felton, *Nearly 750 Charter Schools Are Whiter than the Nearby School Districts*, HECHINGER REP. (June 17, 2018), <https://hechingerreport.org/nearly-750-charter-schools-are-whiter-than-the-nearby-district-schools> (describing the ways in which affluent whites are using charter schools as a means of forming predominately white charter schools in predominately minority school districts).

otherwise would.¹⁴⁰ Yet most students of color attend charter schools that are racially segregated and that do not have high-quality educational inputs.¹⁴¹

To that end, the supposed substantive advantages of universalism are not being manifested through charter schools because students of color are in many ways not in a better position in terms of having racially-equal access to public schools.¹⁴² Similarly, the expressive advantages of universalism for charter schools are also insufficient. Market-based reforms as advanced through charter schools convey the message that parents, and caregivers of color bear the responsibility when their children are unable to obtain a quality education, “thus shifting responsibility from the state to individuals when choice fails to improve educational outcomes.”¹⁴³

Further, the tactical advantages of universalism insofar as charter schools are concerned may be effective in galvanizing widespread political support for charter schools. Nonetheless, the political support for charter schools is arguably coming at the expense of and supplanting other potential particularist race-targeted policies and legal solutions that might be more effective at ensuring that all students have racially-equal access to public schools.

“[U]niversal policies, if not well designed, can exacerbate rather than ameliorate racial conditions.”¹⁴⁴ As described in the concluding Part that follows, taking a more targeted universalist approach towards charter schools offers a more promising path to ensuring that all students have racially-equal access to public schools.

V. CONCLUSION

This Article argues that market-based reforms as advanced through charter schools are positioned as a potential universalist policy solution for ensuring that all students have racially-equal access to public schools. However, race interjects sub-optimal market conditions into education markets and creates a collective action problem that results in charter schools not being able to capitalize on the tactical, substantive, and expressive advantages that universalist solutions can bring to bear on problems of racial inequality.

Given the deficiencies in charters as a universalist policy, the time has come to consider supplementing charter policies with particularistic race-specific policies to ensure that all students have racially-equal access to public schools. For that to happen, “we must understand the work that our institutions and policies are

140. Selim Algar, *Success Academy Calls for Big Expansion as Wait Lists Swell*, N. Y. POST (Apr. 6, 2017), <https://nypost.com/2017/04/06/success-academy-calls-for-big-expansion-as-wait-lists-swell> (describing the limited number of slots for students in a quality Harlem charter school); John R. Logan & Julia Burdick-Will, *School Segregation, Charter Schools, and Access to Quality Education*, 38 J. OF URB. AFF. 342 (2016) (documenting that in very high-poverty schools for Black and Latino students, attendance at a charter school can increase their performance by an estimated ten percentage points).

141. FRANKENBERG ET AL., *supra* note 26 (describing how racial segregation impacts charter schools and the quality of education they provide).

142. *See id.* at 2 (finding that “charter schools are more racially isolated than traditional public schools in virtually every state and large metropolitan area in the nation”)

143. *See* James, *supra* note 31, at 1102.

144. powell, *supra* note 58, at 803.

in fact doing, not what we want or hope for them to do.”¹⁴⁵ In the context of charter schools, we must be more cognizant of the ways in which group-based subordination makes a purely universalist approach to charter school access an insufficient approach. Instead, charter laws and policies should incorporate both universalist and targeted practices.

For example, charter-enabling legislation might include requirements that individual charter schools must reasonably reflect the racial and socioeconomic demographics of the school district. Such a provision would help prevent more affluent white parents from using school choice to create predominately white charter enclaves in the middle of a more racially diverse school district. Further, charter laws might also be amended to reduce barriers to entry for traditionally marginalized racial groups. Examples of this include requiring all charter schools to offer free and reduced lunch and to provide transportation.¹⁴⁶ Finally, admission to charter schools might move away from a pure lottery system to one that considers diversity in charter admissions. A weighted lottery might be employed—for example, to give preference to families that qualify for free and reduced lunch as a means of attracting more low-income families of color.¹⁴⁷ While by no means a panacea, incorporating targeted interventions into charter policies would help to overcome some of the sub-optimal market conditions and collective action problems that race currently injects into public education markets.

145. *Id.* at 802.

146. See, e.g., LADD, CLOTFELTER & TURAEVA, *supra* note 112, at 38.

147. See, e.g., Reema Khrais, *Exploring the Racial Imbalance of North Carolina’s Charter Schools*, WUNC (Jan. 21, 2016), <http://www.wunc.org/post/exploring-racial-imbalance-ncs-charter-schools#stream/0> (explaining how a North Carolina charter school enacted a weighted lottery in order to attract a broader range of students from low-income families of color).